

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Rockwell Mining LLC and United Mine Workers of America, International Union, AFL-CIO. Case 09-CA-206434

November 29, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On June 4, 2018, Administrative Law Judge Paul Bogas issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief to the General Counsel and Charging Party's exceptions and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 29, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

The Board's decision can be found at www.nlr.gov/case/09-CA-206434 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

¹ Contrary to the General Counsel's and Charging Party's arguments on exceptions, the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), clearly pertains to both the 8(a)(3) and 8(a)(4) allegations.

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Daniel A. Goode, Esq., for the General Counsel.
Anna M. Dailey, Esq. (Dinsmore & Shohl, LLP), of Charleston, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Charleston, West Virginia, on April 3 and 4, 2018. The United Mine Workers of America, International Union, AFL-CIO (Union or UMW or charging party) filed the charge on September 18, 2017, and amended the charge on November 29, 2017. The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the Complaint on December 20, 2017. The Complaint alleges that when Rockwell Mining LLC (the Respondent or Rockwell) suspended employee Jerry Hager (Hager) on September 18, 2017, and discharged him on September 21, 2017, it violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) because it was discriminating based on Hager's union and protected concerted activities, and violated Section 8(a)(4) and (1) because it was discriminating based on Hager testifying at a Board representation hearing. The Respondent filed a timely Answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, mines coal in Wharton, West Virginia, where it annually sells and ships goods valued in excess of \$50,000 directly to points outside the State of West Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

We agree that the Respondent established that it would have discharged employee Jerry Hager even in the absence of his union activity. In these circumstances, we need not pass on the judge's finding—to which no party excepts—that antiunion animus was a motivating factor in Hager's discharge.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent mines coal at multiple locations. The allegations in this case concern the Respondent's Glancy mine – a surface mine that the Respondent started in 2016 in Wharton, West Virginia. The Respondent has approximately 500 employees of whom 70 to 80 work at the Glancy mine. The Respondent is one of a number of subsidiaries of Blackhawk Mining, LLC (Blackhawk).

The Respondent hired Hager on April 25, 2017, to work as a mobile equipment operator at the Glancy surface mine. At the time the Respondent recruited Hager and offered him a position, he was working on the night shift at another Blackhawk-owned mining company. When Hager arrived for work at the Glancy mine, the Respondent “task trained” him on the operation of bulldozers and excavators—the two types of equipment that he was initially assigned to operate. Although Hager came to the Respondent because he was told he could work on the day shift, when he arrived at the Glancy mine the Respondent assigned him to the night shift.

B. Union Campaign and Respondent's Meetings

The employees at the Glancy mine were not union-represented during the period leading up to the events of this case.¹ On July 7, the Respondent became aware that the UMWA had begun soliciting employees at the Glancy mine to sign cards authorizing the UMWA to represent them. The charging party in this case, Hager, assisted in the union effort by, *inter alia*, distributing union authorization cards and asking employees to sign them. On one occasion in early July, Hager solicited signatures during an off-the-worksites meeting with a group of about 19 employees. A number of those employees were relatives of management officials. On July 6, Hager himself signed a union card. Prounion activity was also engaged in by another employee, James McDonald. Like Hager, McDonald collected union authorization cards from coworkers. The Respondent became aware of McDonald's union support in July when the Union selected him as its observer for purposes of the representation election scheduled for August 3.

Within a week of when it discovered that the UMWA was campaigning to represent employees at the Glancy mine, the Respondent held four meetings at which it discussed the Union with employees. On July 11, it held one meeting for day shift employees and one meeting for night shift employees. A large number of management and supervisory officials were present, including: Jeff Sands (Blackhawk's senior vice president of operations), Samuel Maggard (Blackhawk's vice president of surface operations), Joe Evans (Respondent's general manager), Colin

Milam (Respondent's human resources manager), Wes Harvey (Respondent's superintendent for the Glancy mine), Charley Meddings (Respondent's surface foreman for the Glancy mine), and James Miller (Respondent's day shift foreman for the Glancy mine).² During the July 11 presentation, representatives of management asked the employees to choose to remain union-free and argued that union representation was not in employees' interests.³ During a question and answer portion of the meeting, Hager raised issues regarding employees' working conditions. He stated that due to the Respondent's failure to provide replacement wiper blades for mobile equipment, employees had been complaining about difficulty seeing. He also complained about the air conditioning in mobile equipment not functioning properly. At the meeting Hager stated that he was raising complaints that other employees shared but were too timid to express to management.

On July 13, the Respondent conducted two more meetings—one for day shift employees and one for night shift employees. All of the managers who attended the July 11 meetings, with the exception of Milam, also attended the July 13 meetings. A number of additional managers attended the July 13 meetings, most notably John Mitch Potter—Blackhawk's owner, president, and chief executive officer. Other additional managers present included Jesse Parish (Blackhawk's chief financial officer), Shawn Creech (Blackhawk's maintenance manager), and Barry Sexton (Respondent's maintenance foreman for the Glancy mine). Potter spoke at the meeting, stating, *inter alia*, that he insisted upon managers and employees behaving with respect. Potter gave others a chance to speak, and a number of employee complaints were discussed. Some of the problems that employees raised to Potter were rectified that same day or soon thereafter.⁴ The record does not show whether Hager asked any questions or made any statements during the meeting that he attended on July 13.

A day later, on July 14, the UMWA filed a petition with the Board seeking to represent the production and maintenance employees at the Glancy mine.

On July 17, while the Union campaign was ongoing, the Respondent granted Hager the day shift schedule that he had been seeking. On the day shift, Hager had a new supervisor—Miller, the day shift foreman. Instead of having Hager operate bulldozers and excavators—the equipment that he had been operating for the Respondent—Miller assigned Hager to operate a rock truck. The rock truck is an over-sized dump truck with an operating weight of 550,000 pounds and which can carry loads of up to 150 or 200 tons. It is over 36 feet long, 16 feet high, and nearly 22 feet wide. The truck has an enclosed cab with a seat for the operator and one for a passenger. Hager had operated this type of truck 3 or 4 years earlier while working for another employer, but had not previously operated it for this employer or at the

¹ The Respondent has labor contracts with the UMWA covering employees at four of its other facilities.

² On approximately August 20, 2017, the Respondent promoted Miller to superintendent of the Glancy mine.

³ The General Counsel points out that an outline that the Respondent prepared for the meeting includes the following language: “Our customers want to know that we can insure them with a dependable and uninterrupted supply of coal, this is why many customers today often prefer to buy their coal from union-free operations like ours.” Joint Exhibit

Number (J Exh.) 2, Page 4. As the General Counsel notes, this statement is not alleged to be a violation. Moreover, the record does not show that this outline was distributed to employees or that all the language in the outline was actually communicated during the meeting. In particular, the testimony did not establish that the Respondent told employees that customers preferred to buy from union-free suppliers.

⁴ There is no allegation in this case that the Respondent violated the Act by soliciting employee grievances and promising to remedy them.

Glancy mine. The Respondent did not task train Hager on the rock truck, something that it appears it was required to do by federal mine safety standards.⁵

The Respondent held another meeting with employees on July 20 or 21 to further discuss the union campaign. This meeting took place at the Blackhawk offices near the Glancy mine and Maggard and Evans were present for management. The managers played a video presentation for the employees and argued that the UMWA was not a good fit for the Glancy mine. Hager was the first employee to speak when the managers opened the floor for questions. Hager referenced David Muenich, a Glancy employee who been involved in a fuel truck accident on July 19. Hager asked why Muenich was not back at work. Evans responded that Muenich had been suspended. Hager stated that Muenich had a number of family and personnel issues and that if he lost his job it could be “the end of him.” Hager asked additional questions about Muenich, but the managers resisted discussing what they said was a “pending matter.” After the Respondent declined to answer a number of his questions, Hager stated: “I think that’s why we need a union, a third party, because this right here. Because Dave[Muenich] should be back to work by now.” “We’re not a happy family,” Hager said.

The representation election was held on August 3, 2017. There were 27 votes in favor of representation by the UMWA and 25 against. The Respondent filed objections to the election and on August 24 a hearing was held on those objections. One of the Respondent’s objections specifically mentioned Hager’s statements during a meeting at which he distributed union authorization cards to employees. The UMWA called Hager and Muenich as witnesses and both of them provided testimony supportive of the UMWA’s position. On September 7, the Board hearing officer issued a report recommending that the Respondent’s objections be rejected. On September 21 (the same day as Hager’s allegedly discriminatory discharge), the Respondent filed objections to the hearing officer’s report. On October 20, 2017, the Regional Director remanded the matter and directed the hearing officer to further consider some issues raised by the objections. The hearing officer issued a supplemental report on December 21, 2017. This time the Regional Director, on February 16, 2018, rejected the Respondent’s objections to the hearing officer’s report and certified the UMWA as the representative of production and maintenance employees at the Glancy mine. The Respondent asked the Board to review the Regional Director’s decision and at the time of the hearing before me, the matter was still pending.

C. Hager’s July 24 Accident

The Glancy surface mine has multiple unpaved, non-public, roads on which mobile equipment moves around the mine site.

⁵ The Respondent does not dispute that it was required to train Hager on operation of the rock truck at the Glancy mine. See 30 CFR Section 48.27 (miners assigned to new work tasks as mobile equipment operators must be trained before engaging in those tasks unless, during the preceding 12 months, they have been trained and/or have demonstrated safe operating procedures for such work). However, the parties dispute whether the Respondent, in fact, provided that training.

⁶ In its brief, the General Counsel repeatedly suggests that Hager took this action because he was afraid that the hard hat would interfere with

“Berms”—piles of rock and dirt—are placed along the edges of the roads to help prevent operators from unintentionally driving off the roads.

On July 24, Hager was operating a rock truck, something he had been doing at the Glancy mine since about July 17. There were no adverse weather or road conditions that day. Hager had several loose personal items with him in the cab of the truck, including a hard hat. Hager was not required to wear the hard hat while inside the cab, and he had placed the hard hat on the passenger seat next to him. The passenger seat had a storage compartment beneath it which, if empty, would have had sufficient space to accommodate the hard hat. While testifying, Hager expressed certainty that he would not have been able to secure the hard hat in that compartment because the space was always cluttered with cleaning supplies and other items. He conceded, however, that on the day of the accident he had not checked to see if this was true. Hager was driving down an incline on one of the mine site’s unpaved roads and his route required him to make a sharp right turn onto another mine road. When he made the turn, the hard hat slid off the passenger seat and onto the floor of the vehicle in the area between the passenger seat and the foot pedals. The hard hat did not fall into an area where it directly interfered with Hager’s access to the truck’s foot pedals, but it was about a foot from that area. Without stopping the truck, Hager bent down to retrieve the hard hat. Doing this required him to lower his head below the dashboard of the truck and briefly sacrifice his view of the road. Hager testified that retrieving the hard hat in this manner was a “split second” decision.⁶

When Hager raised his head back up to look ahead again, he was heading through the berm on the right side of the road. By Hager’s own account, he hit the berm almost head on, not in a glancing manner. On the other side of the berm there was a slope down to an area approximately 60 feet below. The truck continued through the berm, then rolled side over side down the slope before coming to rest. According to Miller, Maggard, and Evans the accident was catastrophic enough that they feared that Hager had been fatally injured. An inspector from the Federal Mine Safety and Health Administration (MSHA) concluded that the accident was of a type that could reasonably be expected to result in a permanently disabling injury. Respondent’s Exhibit Number (R. Exh.) 6, Page 21. Hager was alive, although with injuries to his spine and head. Miller and others assisted Hager in getting down from the truck. Emergency medical technicians arrived and checked on Hager’s condition. Hager said he wanted a cigarette and, after some initial resistance, someone provided one to him. Oxygen was administered to Hager and he was stabilized using a “back board” and a neck brace.

Hager was subsequently taken to a hospital by ambulance.

his access to the pedals used to operate the truck. I note that while Hager testified, the General Counsel does not point to any testimony in which Hager claimed that he acted out of a fear that the presence of the hard hat on the floor of the truck threatened his ability to use the pedals or otherwise operate the truck. There is a statement in the MSHA inspector’s notes that references such concerns, but that statement is hearsay and I do not credit it.

While Hager was waiting for the ambulance to transport him to the hospital, Miller told him “I need your task training papers for the truck.” Hager told Miller, “I’ve never been task trained on that truck here.” Miller returned 10 to 15 minutes later, bent down to Hager, and said: “I filled them out. You’ll have to sign them later.” Hager responded that he would not sign the documents.⁷

At the hospital, Hager underwent a number of tests, including an MRI and a CAT scan. Hager testified that the tests showed that he had fractured his spine. He was given pain medication and discharged from the hospital the same day as the accident, although his injuries prevented him from returning to work for a period of about 2 months. Hager had been employed by the Respondent for 90 days at the time of the accident.⁸

The Respondent completed a “preliminary incident investigation report,” R Exh. 4, which recounted in general terms what had occurred and discussed Hager’s injuries. In the portion of the report entitled “steps to prevent recurrence,” the Respondent stated: “360 Degree awareness and attention to task at hand. Investigations are still pending. Determination shall be made after all information is gathered.” With Hager’s cooperation, Milam examined the message history on Hager’s cell phone, which had been left at the accident scene, to determine whether Hager had been texting at the time of the accident. Milam concluded that Hager had not been texting.

The damage to the truck resulting from the accident caused it to be out-of-service for 1 month. The Respondent spent approximately \$61,000 on parts and its mechanics worked 200 hours to make the necessary repairs to the truck. For a period of time, the Glancy mine was forced to cease operations due to the accident.

D. Federal and State Investigations Regarding the Accident

The circumstances that led to the July 24 accident are not meaningfully disputed here. Neither Hager, nor anyone else, has suggested that the truck itself was unsound or malfunctioning in any way or that weather or road conditions contributed to the accident. Investigations regarding the accident were conducted by both MSHA and the State of West Virginia Office of Miners’

⁷ Hager and Miller gave contradictory accounts of the July 24 conversation regarding the task training form. I found Hager’s testimony more credible on this subject and credit his version over Miller’s. Hager’s demeanor when testifying on this subject was clear, certain, and measured. In addition, his account was plausible. MSHA requires task training and also requires that the Respondent fill out the form regarding the task training. Significant penalties are associated with a mining company’s failure to provide required task training or to properly document it. It is not surprising that Miller, knowing that Hager’s accident would be investigated by government authorities, would be concerned about causing the Respondent to incur such penalties and would seek to have the task training documentation in order.

I reject the contrary testimony of Miller, who stated that it was Hager who, while waiting to be taken by ambulance to a hospital, expressed a desire to sign the task training form. Miller claims he replied, “I [am] not worried about that.” I did not find Miller a credible witness regarding disputed matters based on his demeanor and testimony. He appeared uncomfortable while testifying and his voice dropped and became more timid while answering some of the questions about the task training issue. Moreover, I find his account of the July 24 conversation implausible. It is hard to believe that Hager—while waiting to be taken to the hospital by ambulance after a traumatic accident in which he was seriously

Health, Safety and Training, as well as by the Respondent.

Aaron Cline, an MSHA inspector, began his investigation of the accident on July 24. Cline interviewed Hager by phone on the evening of July 24. He also inspected the accident scene and interviewed multiple other individuals who witnessed the accident or the immediate aftermath of the accident. Based on the investigation, MSHA issued the following written conclusions regarding the causes of the accident:

DIRECT CAUSE: The rock truck travelled through the berm causing the truck to roll over.

INDIRECT CAUSE: The truck driver lost control of the truck while retrieving his hard hat from the floor.

INDIRECT CAUSE: The hard hat fell into the floor because it was not secured.

ROOT CAUSE: Policies and procedures failed in assuring that equipment operators have full control their equipment while in operation.

ROOT CAUSE: Policies and procedures failed in assuring that any material that is in the cab of mobile equipment is secured while the equipment is in operation.⁹

R. Exh. 6, Page 32.

The MSHA inspector issued a safety violation based on Hager losing control of the vehicle while attempting to retrieve his hard hat. *Id.* at Page 21. The violation stated:

The operator of the [rock truck] failed to maintain control of the truck while it was in motion. The operator attempted to retrieve his hard hat that had fallen onto the floor while the truck was in motion causing him to lose control and drive through a berm on an elevated roadway.

The MSHA inspector characterized the incident as “significant and substantial” and the level of negligence involved as “low.”

injured—would be worrying about the completion of training forms. Those forms were Miller’s and the Respondent’s responsibility, not Hager’s. Moreover, for reasons that are discussed elsewhere I find that Miller’s testimony on related subjects—in particular on the question of whether he actually did train Hager on operation of the rock truck—was not truthful.

⁸ On the day Hager started work he signed a Blackhawk new hire orientation form, and separately acknowledged a number of provisions set forth in the form by placing his initials next to those provisions. One of the provisions that Hager initialed stated: “Everyone is hired on a 90-day trial basis. It gives you an opportunity to decide if we are an organization you want to work for and gives us the opportunity to watch you and see if you have the skills we require.” R. Exh. 20, Page 5, Paragraph 3.

⁹ Blackhawk, the Respondent’s, parent company, had a number of policies, the tenets of one of which include: “keep your workplace free of hazardous clutter and always practice good housekeeping” and “always face the direction of travel while operating machinery.” J Exh. 8, Page 13. It is not clear whether the Respondent ever pointed these provisions out to employees, nor is it clear what, if any, consideration MSHA gave to these provisions in reaching its conclusion about shortcomings in the Respondent’s policies and procedures.

The MSHA inspector also issued a safety violation based on the presence of loose items in the cab. *Id.* at Page 28. This violation also characterized the level of negligence as “low.” As a remedial measure, MSHA required the Respondent to conduct a safety training session with employees on July 31. The training was conducted by Cline (the MSHA safety inspector) along with Miller and Meddings. The focus of this training was to impress upon employees the necessity of securing any loose items present in mobile equipment while they were operating such equipment.

The West Virginia Office of Miners’ Health, Safety and Training conducted an investigation and also found a violation by the Respondent. The violation issued by the State agency was based on its conclusion that the berm on the mine road where Hager had his accident was not adequately constructed. General Counsel Exhibit Number (GC Exh.) 19.¹⁰ It is not clear from the notice of the violation whether it is meant to address only the condition of the berm after it was compromised by the accident, or whether it is meant to address the condition of the berm as it existed prior to the accident. Neither the notice of violation, nor the record as a whole, suggest that a berm that complied with State requirements should have kept the truck Hager was driving from going off the road given that he hit the berm almost head on. To the contrary, in the only testimony on the subject, Evans stated that while a vehicle that strikes a berm in a glancing manner could be pushed back towards the road, a vehicle that hits a berm almost head on, as Hager’s truck had, would continue through any berm that Evans had seen in his 37 years in the mining industry. *Tr.* 127 and 196. No witness testified that a properly constructed berm should have prevented Hager from rolling the truck down the hill.

E. Hager Attempts to Return to Work, but is Suspended and then Terminated

Hager’s injuries prevented him from returning to work for almost 2 months and during that period he received workers’ compensation. While Hager was unable to work, the Respondent did not take any disciplinary action against him based on the July 24 accident. On Friday, September 15, Hager obtained a medical release and went to the Glancy mine and presented the release paperwork to Milam. Evans was not available at that time, and Milam told Hager to return to the facility the following Monday for a “return to work” meeting during which they would discuss

the accident. Hager asked whether he should come prepared to work, and Milam said he “might as well.”

Hager came to the facility the following Monday and met with Evans and Milam for a return to work meeting.¹¹ Evans asked Hager if there was anything else the Respondent should know about the accident. Hager stated that there was not anything wrong with the truck, or with the grade of the road, and that the accident was “100 percent Jerry Hager.”¹² He stated that he was anxious to return to work. Evans asked Hager whether there were any mitigating factors that the Respondent should take into account regarding the accident. Hager stated that the Respondent had not task trained him to operate the truck. Evans told Hager that the Respondent had looked into the matter and believed that Miller had, in fact, task trained him and that the only thing left to be done in that regard was for Hager to sign the MSHA task training certification. At any rate, the record does not show that Hager ever claimed that his lack of task training on the rock truck rendered it difficult, or uncomfortable, for him to operate it, nor does it show that Hager asserted that training would have prevented the accident.

Evans told Hager that he was being suspended for 3 days and that the Respondent would perform an investigation regarding the accident during that time. Hager asked why the investigation had not been performed already, and Evans told him it was because the Respondent had to hold its action in abeyance while Hager was out on workers’ compensation. Based on the record, I credit Evans’ and Milam’s testimony that they believed that during the period when Hager was on workers compensation it was legally advisable to hold consideration of his potential termination in abeyance.¹³ Moreover, Evans credibly testified that he was uncertain as to whether Hager would want, or be medically able, to return to work with the Respondent, and, in his view, there was no reason to address the question of disciplining Hager for the accident unless he did seek to return.

On September 21—3 days after the return to work meeting—the Respondent terminated Hager’s employment. Evans and Milam testified that they agreed that this was the appropriate action. The reason given for Hager’s discharge in the Respondent’s contemporaneous records is: “Negligent/unsafe act resulting in bodily injury and property damage.” *R. Exh. 20, Page 33.* Evans and Milam both testified that that was the reason for the

¹⁰ See also *R. Exh. 6, Page 10* (MSHA inspector modifies order regarding preservation of accident scene to allow the Respondent to “replace, build up, and strengthen the berms on the affected hill.”)

¹¹ Blackhawk has a 27-page Teamwork Safety Program, which includes the following language: “In the event of an incident where medical treatment is required on mine property, at least (3) members of the Operational Safety Review Board will participate in a return-to-work interview with the employee(s).” *J. Exh. 8, Page 8.* It is not clear whether Evans and Milam were “members of the Operational Safety Review Board” or had any consciousness of the language quoted by the General Counsel regarding the attendance of three members at return-to-work meetings following medical treatment on mine property. Although the General Counsel points out the safety program language in its brief, it did not elicit any testimony regarding it. There was no testimony that Hager, Evans, Milam or anyone else, requested that three officials be present at the return to work meeting. The record does not include

evidence of other instances in which “medical treatment was required on mine property” and does not show that the Respondent generally adhered to the language regarding the attendance of 3 members of a safety review board where that was the case. On the record, it is not clear that, at the time, anyone involved in the matter was aware of the safety program language pointed out by the General Counsel in its brief.

¹² While testifying, Hager re-affirmed that the accident was “100 percent Jerry Hager.” *Tr.* 69–70.

¹³ The Respondent cites to provisions of the West Virginia code that can reasonably be read to mean that, when an employee is on workers compensation and entitled to disability benefits, it is unlawful discrimination to terminate that employee for actions related to the injury. See *W. Va. Code Section 23-5A-3(a).* It is not clear that this authority, in fact, required the Respondent to hold the investigation and disciplinary decision in abeyance, but the authority does lend credence to Evans’ and Milam’s testimonies that they believed they were required to do so.

discharge decision.¹⁴ Milam testified that he considered Hager's action in taking his eyes completely off the road to be "reckless" and not comparable to the actions of other employees, discussed below, who were involved in accidents but who Milam believed were only guilty of "probably not paying enough attention." Tr. 359–361.

According to Evans and Milam, there were no "mitigating" factors that reduced Hager's culpability for the accident. Milam stated that if they had found that Hager's task training had not been finished "we definitely would have looked at that and taken it into consideration as far as mitigating circumstances surrounding the accident." Tr. 348–349. However, Milam did not state that such consideration would ultimately have altered the decision given the circumstances present here.

Evans made the final termination recommendation and forwarded it to Blackhawk's human resources department and legal department for approval. The recommendation included information about whether the employee had made complaints regarding safety and/or under various laws. According to Milam, this information is included "so we can have a conversation to make sure that we're not doing something that we shouldn't be doing."

Evans and Milam informed Hager of the termination decision by phone. Hager stated that he wanted to keep his job and pressed them to consider that the Respondent had not task trained him on the truck. The Respondent's officials responded that they believed Hager had, in fact, been task trained. Hager accused them of terminating him because of the union campaign. Evans responded that Hager was not being discharged for reasons related to the union campaign, but rather because he failed to maintain control of his vehicle due to his negligence. Hager had not been disciplined during his 90 days of employment prior to the July 24 accident.

The parties spent a significant amount of time presenting evidence on the question of whether the Respondent had, in fact, task trained Hager on the truck. I find that the Respondent did not do so. In this regard, I found the MSHA task training certification form very telling. R. Exh. 14. This document, filled out by Miller, purports to show that the training requirements were completed on July 17. The Respondent has not plausibly explained why, if this was the case, the Respondent had not obtained Hager's signature on the trainee signature line a full week later at the time of the accident. I note that the record includes 54 task training forms for other employees and every one of those forms was signed and the date line for the trainee's signature was the same as a date when training occurred. GC Exh. 26. In addition, Miller admitted at trial that he, not Hager, placed Hager's initials in the section of the form where the trainee is required to initial to certify that the training was received. Tr. 231–232. I consider it highly suspicious that Miller would falsify the form by placing Hager's initials in the section where Hager himself was supposed to initial. Lastly, the record shows that

training certifications are completed in a book and that carbon copies of those certifications remain in the book in the chronological order in which they are completed. Thus, if the disputed Hager training certification form was situated in its proper chronological position within the book it would support the Respondent's claim that Hager was task trained on the date given on the form. On the other hand, if the form for Hager was situated out of chronological order—and in particular, if it was positioned later in the book than the certification forms dated after July 17—it would suggest that the disputed Hager certification document was created after the fact. This was raised at the hearing, but the Respondent chose to present only a copy of the page from the certification book that showed the Hager training certification form dated July 17, and did not introduce, or present for inspection, the entire book in which it was contained. The Respondent did not explain its failure to do so. Based on all of the above, I find that Miller did not complete the MSHA certification for Hager on July 17 to reflect training that had occurred that day, but rather completed it after the accident occurred.

In addition, I found Hager a more credible witness than Miller on the question of whether Miller had task-trained Hager on operation of the truck. Hager testified in a clear and certain manner that the Respondent had not task trained him on the rock truck. As noted previously, Miller appeared uncomfortable and his voice sometimes dropped or became more timid while he was testifying on the subject. I note, moreover, that Miller would have an incentive to claim that Hager was task-trained on the truck, since it was his responsibility to comply with the MSHA training requirement for Hager and shield the Respondent from the penalties for failing to do so. There is no comparable reason why Hager, at the time of the accident, would deny that he had been task trained on the truck. Certainly, there is no reason at all why Hager would believe that he could benefit from not signing the task training certification on July 17 (a week before the accident), when the certification states that the training was completed.

In addition, I do not credit Miller's claim that the reason Hager had not signed the MSHA certification as of July 24 was that, although the training had been completed a week earlier, Miller was still assessing whether Hager could capably operate the rock truck. To begin with, it is clear that all Hager could certify to was that he received the training, not that he was capable of operating the vehicle in Miller's eyes. So while Miller's reasoning might conceivably explain why Miller himself had not yet signed the form as of July 24, it in no way explains why Hager did not sign the form at the time of the training, which the trial exhibits indicate was standard practice. Moreover, the record does not suggest that there was anything about Miller's observation of Hager that would warrant an unusually extended observation period. To the contrary, Miller testified that on July 17 he watched Hager operate the truck, Tr. 229, and that task training took only 15 to 20 minutes because Hager "understood pretty much

¹⁴ Blackhawk's written Teamwork Safety Program expressly directs employees to keep their workplace "free of hazardous clutter and always practice good housekeeping, and also to "[a]lways face the direction of travel while operating machinery." J Exh. 8, Page 13. These rules were not identified by Evans and Milam as bases for the decision to terminate

Hager. The record shows that Hager received a copy of the safety program document on April 25, 2017, but there was no evidence showing that the above quoted rules, or any other portion of the document, were discussed with Hager during his orientation or at any other time prior to the July 24 accident.

everything about the truck,” Tr. 228. For all these reasons, I find that, had task training actually been completed on July 17, Hager would have signed the certification form on that date, just as the record indicates had been the case with other trainees,¹⁵ not left it blank for the purposes of continuing observation a full week later.

Although I find that Miller did not task train Hager on the rock truck, the record does not provide a basis for concluding that Evans and Milam were motivated by antiunion animus when they chose to credit Miller’s representations that Hager had been trained. If the Respondent had chosen to credit Hager’s statement that he had not been task trained, rather than its own supervisor’s statement that Hager had been trained, it would have opened the Respondent up to substantial penalties. Thus, even assuming that Evans’ and Milam’s decision to credit Miller was not only wrong, but also unreasonable given the other evidence available to them, that would not, under the circumstances present here, show that their inquiry or conclusion was tainted by animosity towards Hager’s protected activity.

F. Discipline Administered to Other Employees Involved in Accidents

When deciding what, if any, level of discipline to impose on employees who have accidents at the Glancy mine, the factors that the Respondent has considered include the degree of negligence attributable to the employee, the severity and/or potential severity of the accident, and mitigating factors. Evans’ and Milam’s testimony indicated that mitigating factors include such things as inclement weather, poor road conditions, and the extent to which the Respondent could have taken steps to help prevent the accident.

In their posthearing briefs, the parties discuss three Glancy employees who the record shows were involved in equipment accidents, but were not discharged. The General Counsel contends that the Respondent meted out harsher discipline to Hager than to two of the other employees and that the reason for the harsher discipline was that Hager had engaged in protected union and concerted activity, and because he testified for the Union in the August 24 hearing regarding election objections. The Respondent contends that the difference in discipline was based on differences in the circumstances of the accidents.

1. David Muenich: Muenich began working for the Respondent in March or April of 2017. He operated a fuel truck that circulated around the Glancy mine and provided fuel to other equipment. He was involved in a workplace accident on July 19, 2017. He was operating the truck on a coal seam that was elevated approximately 34 inches above the surrounding coal pit floor.

¹⁵ I am not persuaded to the contrary by the fact that Cline, the MSHA inspector, did not cite the Respondent for failing to task train Hager on operation of the rock truck. Cline did not testify, and his investigation notes make no mention of the question of task training, do not discuss what, if any, conclusion he reached on that issue, and certainly do not describe how he came to any conclusion he might have reached. At any rate, Cline did not have the benefit of observing Hager and Miller address the matter while testifying under oath and subject to cross examination. I also give no weight to the Respondent’s proffer of testimony by Milam that he had been told by Miller that he in turn had been told by Cline that he had in turn been told by Hager that the task training had been

There was an area at the edge of the seam where the Respondent had sloped the coal into a ramp over which equipment could be driven down from the seam to the pit floor. In other areas there was just a ledge and a drop at the edge of the seam. The coal seam, the sloped area, the ledge, and the coal pit area around it were all the same color.

At the time of the July 19 accident, Muenich was driving the fuel truck down from the elevated seam. Muenich thought he was entering onto the drivable slope, but instead drove off the ledge that was adjacent to the slope. The resulting 34-inch drop caused damage to the truck. The parts necessary to repair the truck cost \$6000 to \$7000, and the repair receipts for the work total approximately \$10,000. The truck was out of operation for several weeks. During the Respondent’s investigation of the accident, Muenich stated to the Respondent that it had been his fault. There is no indication in the record that anybody was injured as a result of the accident, or that MSHA found a safety violation.

The decision about what disciplinary action to take against Muenich for the July 19 accident was made by Maggard (Blackhawk president of surface operations) and Evans. They decided not to discharge Muenich, but rather suspended him from the time of the accident until July 25. The disciplinary notice, which was signed by Milam and Muenich, stated that the action was based on “substandard work” and “violation of safety rules.” The notice also states that future violations of safety policy or practice would result in discipline up to, and including, discharge.

Maggard and Evans both testified that they considered certain mitigating factors in deciding not to terminate Muenich for the July 19 accident. They both noted that given that the coal seam and the surrounding area were all the same color it was understandable that Muenich would find it difficult to tell that he was heading towards a ledge rather than towards the drivable slope. Maggard recalled making what he considered a similar mistake early in his own career. Maggard stated that Muenich’s negligence was a “misjudgment” and not the same sort of negligence that Hager committed when he ducked under the dashboard, taking his eyes off the road, to retrieve his hard hat.¹⁶ Evans testified that the Respondent, in assessing discipline for Muenich, considered the fact that the company had not put a berm at the edge of the coal seam to signal where the ledge was to help employees locate the drivable slope. Evans’ testimony suggests that termination of Muenich was considered a possibility, but that, based on the circumstances, the Respondent “chose for it not to be something that was a termination offense” Tr. 185, but rather cause for a suspension.

completed. Not only is this unreliable multiple level hearsay, but the entire chain is premised on the reliability of Miller’s communication to Milam on the subject and, as previously discussed, Miller was not a credible witness regarding the training issue.

¹⁶ The record does not support the General Counsel’s claim, Brief of General Counsel at Pages 14 to 15, that Muenich drove forward off the ledge because he was not looking at the path ahead, but rather in the rear-view mirror. The evidence indicates that Muenich had checked his rear-view mirror, but not that he was doing so at the time he drove off the edge of the coal seam.

When Muenich returned to work, Evans told Muenich that he hoped that the decision not to discharge him “plays in our favor that you maybe think about voting nonunion for us.” A short time thereafter, Meddings (foreman at the Glancy mine) told Muenich that if the employees elected union representation, the life of the operation at the Glancy mine would be shortened.

Subsequent to the events surrounding the July 19 accident, and Muenich’s return to work following it, Muenich testified as a witness for the Union in the same August 24 hearing on election objections at which Hager testified. The record does not show that Muenich engaged in protected activities prior to the hearing, or, if he did, that the Respondent knew of any such activities. That means, as well, that there is no evidence that the Respondent knew of any union activities by Muenich at the time it decided on what discipline to impose based on the July 19 accident.

On February 15, 2018, Muenich was involved in a second incident at the Glancy mine, although one that was not an accident that caused damage. That day, Muenich was operating a fuel truck that had a defective fuel gauge for its own engine. There was also a problem with the truck’s alternator. On the day in question, Muenich’s engine ran out of fuel and he needed the assistance of others to begin operating again. Muenich testified that running out of fuel would usually not have been a problem for him because he could refuel his own truck from the tank that he carried to fuel other vehicles. However, it was not possible to do that in this instance because of the malfunctioning alternator in his truck. The Respondent suspended Muenich for 5 to 7 days for the February 15 incident. According to Evans, a mitigating factor that weighed against more severe discipline was that the truck’s malfunctioning fuel gauge and alternator that had contributed to the incident.

2. *James McDonald*: McDonald has been employed by the Respondent as a technician since March 23, 2017. In July 2017 the Respondent was informed that McDonald would be the union observer during the August 3 representation election. McDonald also assisted the Union by collecting authorization cards from employees.

McDonald was involved in an accident on October 9, 2017. He was backing up a truck at the Glancy mine and ran into a portable toilet, destroying it. No one was in the toilet at the time or there likely would have been a serious injury. When McDonald hit the toilet he also hit an oxygen apparatus of some kind, and damaged that as well. McDonald testified that in his view the Respondent bore full responsibility for the accident because the portable toilet had been moved to that location for the first time that day and “no one was told.” McDonald indicated that the portable toilet’s new location was in an area that he had customarily used for backing up. There is no evidence in the file that this accident, which did not cause an injury, was reported to, or investigated by, MSHA. The Respondent’s internal incident report lists the following “steps . . . to prevent recurrence”: “Keep all porta johns out of heavy traffic areas. Be more aware of surroundings and work area.”

Evans issued an oral warning to McDonald for his part in the accident. Evans testified that more extreme discipline was not called for given mitigating factors. Specifically, Evans stated that McDonald was called upon to back the truck up in very tight quarters, visibility was limited because the area was congested,

the truck did not have a backup camera, and the portable toilet had just been moved into an area that drivers were accustomed to using for backing up.

3. *Dave Dingess*: On October 3, 2017, Dingess was assigned to use an excavator with a hammer attachment to break up rocks. He had positioned the excavator on top of some the rocks themselves. It was night, and quite dark, although the darkness was not total because of lights on the excavator. At one point the rocks supporting the excavator shifted without Dingess’ knowledge and, when he turned the excavator, it became unbalanced, slid down, and tipped onto its side. As a result of this accident the excavator was out-of-service for a month and required repairs costing approximately \$13,500. The Respondent’s documentation regarding the accident states that Dingess’ injuries were limited to scratches and cuts, and that he had declined to go to the hospital.

The record evidence is somewhat unclear on Dingess’ level of responsibility for the accident. In a written statement, Dingess indicated to the Respondent that he had performed the same type of task in the same manner many times during his 20 years as a miner. He stated that it would have been “good” to have a light on the back of the excavator. Milam’s report on the incident states that the details had been discussed with “upper management” and “[a]ll parties came to the conclusion . . . that the incident did not occur due to negligence by Mr. Dingess.” Evans testified, however, that Dingess “could have done it better . . . could have evacuated himself off of that pad in a different manner that would have prevented—possibly prevented what happened.” A report of the Respondent’s investigation of the accident identifies the cause as “improper position for the task” and says recurrence should be prevented by having “employees operating this equipment stay on stable ground while busting rocks.” GC Exh. 13. There was no evidence that it was uncommon for employees to position excavators in the manner that Dingess had at the time of the accident or that, prior to the accident, employees had been discouraged from doing so. Evans stated that in deciding on the discipline imposed on Dingess, he considered that at the time of the accident Dingess was operating in the dark. In an internal report, Milam stated that “[t]he three days [Dingess] spent away from work will stand for discipline in this matter.”

Analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act by discriminatorily suspending and then terminating Hager because of his protected concerted and union activities and because he testified during the August 24 representation case hearing. In such cases the General Counsel, under the Wright Line decision, bears the initial burden of showing that the Respondent’s decision to take adverse action against an employee was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (Section 8(a)(3) and (1)); see also *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006) (*Wright Line* analysis applied to allegation that an employer violated Section 8(a)(1) by

discriminating based on protected concerted activity), *American Gardens Mgmt. Co.*, 338 NLRB 644, 644–645 (2002) (*Wright Line* analysis applies to allegation that employer violated Section 8(a)(4) by discriminating against employee for testifying in a representation hearing) and *Gary Enterprises*, 300 NLRB 1111, 1113 (1990), enf. 958 F.2d 368 (4th Cir. 1992) (Table) (same). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011) *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

There is no dispute in this case that Hager engaged in activity protected by the Act and that the Respondent was aware of that activity. In early July, Hager engaged in union activity by meeting with employees and asking them to sign union authorization cards. It is reasonable to infer that the Respondent knew about Hager's activities, not only because relatives of management officials were among the employees present and because the Respondent stipulates that employees informed management about the card solicitation effort, but also because the Respondent's objections to the election specifically discuss Hager's conduct during his meeting with employees. Hager engaged in additional protected activity during meetings that the Respondent held with employees. At the meeting on July 11, Hager voiced complaints on behalf of himself and others about issues with the maintenance of equipment. During the meeting that Milam held with employees on July 20 or 21, Hager publicly argued that the Respondent's suspension of Muenich demonstrated that employees needed union representation. Hager engaged in activities protected by Section 8(a)(4), and known to the Respondent, on August 24 when he testified on behalf of the Union at the Board hearing on the Respondent's objections to the election.

The General Counsel has a much more difficult time with the third element of its initial burden—i.e., establishing that the employer harbored animosity towards the Union or other protected activity. The record does not show that the Respondent directed antiunion statements or threats at Hager or his protected activity. Nor is there evidence that the Respondent attempted to interfere with Hager's prounion efforts during the campaign or his cooperation with the Union during the representation proceeding. Although the Respondent campaigned against the Union, and continues to challenge the Union's certification as bargaining representative at the Glancy mine, the General Counsel has not alleged or shown that the Respondent exceeded the bounds of its lawful right to campaign against unionization or that its statements included threats or other unlawful coercion in violation of

the Act. Nor is there evidence that the Respondent had a history of violating, or being accused of violating, the Act at its other facilities, a number of which have bargaining units represented by the Union. Cf. *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007) (employer's prior unfair labor practices relied on as evidence that discipline was motivated by union animus).

I also reject the contention that animus is evidenced by what the General Counsel calls the "lackluster" quality of the Respondent's investigation of Hager's accident. Brief of General Counsel, Page 20. By the time it made the decision to suspend and then terminate Hager, the accident had been subject not only to the Respondent's inquiry, but to an extensive MSHA investigation with which the Respondent cooperated. The Respondent did not discipline Hager until after MSHA completed its investigation and provided its findings, which indicated that Hager's actions were a cause of the accident. At the time it decided on discipline, the Respondent knew the high cost of repairing the truck and of the MSHA citations. At any rate, this was not an instance in which the key facts were disputed and where further investigation was necessary to determine the essentials of what happened. The Respondent and Hager agree that neither mechanical issues nor weather or road conditions contributed to the accident and that the accident occurred when Hager lost control of the vehicle he was driving because he ducked under the dashboard of his truck to retrieve a hard hat. Even at that, when Hager attempted to return to work the Respondent gave him an opportunity to raise anything else he thought the Respondent should know about the accident before deciding about discipline. Hager was not shy about doing so, repeatedly stating that he was not task trained regarding the truck. Given these circumstances, the General Counsel has not shown that the investigation was inadequate, much less that it was suspiciously inadequate. Cf. *Ampitech, Inc.*, 342 NLRB 1131, 1146 (2004) (failure to inquire of the disciplined employee "constituted a rush to judgment attributable to Respondent's unlawful motivation to take adverse action against the leading prounion employee on the premises"), enf. 165 Fed. Appx. 435 (6th Cir. 2006).

The strongest evidence of antiunion animus that I find on this record is Evans' July 2017 statement to employee Muenich in which Evans made an explicit connection between disciplinary leniency and the employee's vote in the union election. Specifically, Evans told Muenich that he hoped that the Respondent's decision not to discharge him for his part in the July 19 accident "plays in our favor that you maybe think about voting nonunion for us." Although this statement by Evans was not made to, or about, Hager, and although there is no allegation that it exceeded the bounds of the Respondent's lawful ability to campaign against the Union, it does provide some relevant evidence of antiunion animosity and a connection of such animosity to the Respondent's disciplinary decisions. See *Brink's Inc.*, 360 NLRB 1206 (2014) ("conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful"). The Board has held that, under *Wright Line*, "proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make a particularized showing of animus towards the disciplined employee's own protected activity."

Commercial Air, Inc., 362 NLRB 379, 379 fn. 1 (2015). Under that standard, Evans' statement to Muenich has some weight even though it was not made to or about Hager.

I am mindful that suspicious timing can often demonstrate animus,¹⁷ however, the General Counsel's argument that the timing in this case was suspicious is not persuasive. It is true that Hager's last day of actual work for the Respondent was July 24—only two or three weeks after Hager held a meeting with employees soliciting their support for the Union and just a few days after the July 20 or 21 meeting at which Hager attempted to counter management's arguments against unionization. If that was the extent of the timeline here, the timing would be relatively strong evidence of animus. In this case, however, there was a significant intervening event—Hager's catastrophic accident of July 24.¹⁸ It was Hager's injuries from that accident that caused him to stop working from July 24 until September 18, not any decision by the Respondent. Moreover, Hager's part in causing that accident, which led to MSHA finding a safety violation, certainly justified, and arguably compelled, the Respondent's consideration of disciplinary action. To the extent that the General Counsel contends in the alternative that the timing is suspicious because the Respondent did not suspend or terminate Hager in the immediate aftermath of the accident but waited to do so until mid-September—after Hager testified in the representation hearing on August 24—that argument is also unpersuasive. The evidence showed that Evans and Milam did not make a decision regarding discipline until after September 18 because that was when Hager was medically released and sought to return to his duties. As discussed earlier, Evans' and Milam's understanding was that it was legally advisable to wait to take disciplinary action until Hager was no longer on workers' compensation and, in any case, they believed it was not necessary to face the disciplinary issue unless and until Hager sought to return to his duties.

On balance I find, based primarily on Evans' statement to Muenich, that the General Counsel has succeeded in making a showing, albeit a weak one, of anti-union animus—the final element of its initial burden under *Wright Line*. Therefore, the burden shifts to the Respondent to show that it would have suspended and terminated Hager absent his protected activity. *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. I find that the Respondent has met that burden here. Hager had been working for the Respondent for only 90 days—the term of his probationary period—at a time when his negligence caused an extraordinarily dangerous, disruptive, and costly accident. Hager's negligence resulted in disabling spinal and head injuries to Hager himself and necessitated the suspension of operations at the Glancy mine. MSHA found that the resulting accident was significant enough that it “could reasonably be expected” to result in “permanently disabling” injuries, and a number of witnesses testified that they feared the injuries would be fatal. The necessary repairs to the

truck cost approximately \$61,000 in parts and 200 hours of mechanics' time. MSHA investigated the accident and found a safety violation based on Hager's losing control of the truck. Milam credibly testified that the Respondent concluded that it was reckless for Hager to take his eyes off the road and duck down under the dashboard while making a turn and without stopping the truck. Similarly, Maggard testified that he viewed Hager's action as particularly reckless. Even if one views Hager's mistake to be an understandable, or even a common, one, the fact that that mistake resulted in such a shocking outcome—i.e., a 550,000-pound truck rolling side-over-side down a slope with the attendant injuries, disruptions, and costs—would reasonably influence the employer's response regardless Hager's protected activities.

In reaching the conclusion that the Respondent showed it would have taken the same action regardless of Hager's protected activities, I considered the fact that the Respondent did not present evidence of any other instances when it terminated a Glancy employee for causing an accident. However, the record does not include evidence of any other accidents that remotely approached Hager's in terms of their severity or which involved comparable employee carelessness. This, I would point out, is not particularly surprising since the Respondent had started the Glancy operation only about a year earlier, and so there was not an extensive history from which to draw examples of comparable accidents.

The General Counsel attempts to counter the evidence that the circumstances of Hager's tenure and accident would have resulted in his suspension and discharge absent any of his protected activity by pointing to the lesser discipline—suspensions—issued to Muenich based on his July 19 accident and to Dingess based on his October 3 accident, and also by arguing that the Respondent failed to give due consideration to mitigating circumstances in Hager's case. The former argument is unpersuasive because neither Muenich's nor Dingess' accident was comparable to Hager's. Neither Muenich nor Dingess was shown to have caused serious injuries, much less injuries that, like Hager's, rendered him disabled from his duties for an extended period of time. Second, neither Muenich's nor Dingess' accident resulted in MSHA finding safety violations or deeming the accidents as so major as to make permanently disabling injuries an expected outcome. Third, only Hager's accident was shown to have resulted in a forced shut-down of the Glancy operation for a period of time. Fourth, the costs of the repairs necessitated by Hager's accident were at least three or four times greater than those for either Muenich's or Dingess' accidents.

I credit the testimony of Evans, Milam and Maggard that the Respondent viewed Hager's negligence as more severe than that of the other employees involved in accidents. The record indicates that Muenich mistook the ledge of the coal seam for the adjacent drivable slope because the seam, the slope, and the

¹⁷ *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2006) (fact that employer's adverse action against employee immediately followed employer's first knowledge of that employee's union sympathies, supports an inference of animus), *enfd.* 232 Fed. Appx. 270 (4th Cir. 2007); see also *Camaco*, 356 NLRB at 1185.

¹⁸ *Cf. Lou's Transport, Inc.*, 361 NLRB 1446, 1458 (2014), *enfd.* 644 Fed. Appx. 690 (6th Cir. 2016) (timing of employee's discharge is not suspicious even though it occurred on the same day as protected activity, where it also occurred on the same day that the employer discovered that the employee had responded to an instruction to continue working by saying “f—k you”).

surrounding coal pit were all the same color, and because the Respondent did not take steps to signal where the drivable area was. In this circumstance, the Respondent reasonably viewed Muenich's accident as resulting from inadequate care when surveying the area ahead as he drove off the seam, not from a reckless decision not even to look where he was going as he drove off the seam. Hager, on the other hand, ducked under the dashboard, completely eliminating his view of the road at a time when the truck was in motion and making a turn. In other words, Hager did not merely misjudge where the road was despite reasonable efforts to see it, he caused the accident by choosing to completely sacrifice his view of the road.

Dingess' level of responsibility for his accident is not clear. In a written statement, Dingess stated to the Respondent that, during his 20 years as a miner, he routinely performed the same type of task in the same manner as he was doing at the time of his accident. Milam's contemporaneous report on the incident states that the details had been discussed with "upper management" and "[a]ll parties came to the conclusion . . . that the incident did not occur due to negligence by Mr. Dingess." Evans testified, that Dingess could possibly have prevented the accident by going about his work in a different manner and the Respondent's internal report stated that it was improper for Dingess to position the excavator on the rocks. However, the record does not show that Dingess knew, or should have known, that positioning the excavator on the rocks was improper or that operators generally avoided doing so. On this record, I credit the Respondent's officials that they did not treat Muenich or Dingess more leniently than Hager for comparable errors and accidents, but rather imposed lesser discipline on them because their errors and accidents were less serious than Hager's.¹⁹ Indeed, under all the circumstances, the fact that the Respondent suspended Muenich and Dingess for their far less serious accidents, and even apparently gave some consideration to whether termination was warranted for Muenich, further persuades me that the Respondent would have terminated Hager for the July 24 accident regardless of his protected activity.

The General Counsel's contention that various mitigating factors in Hager's case were not given appropriate consideration in the discipline decision is also not persuasive. The General Counsel argues that Hager's discipline should have been adjusted based on Miller's failure to task train Hager on the operation of the truck. As discussed above, however, the Respondent inquired into this matter and concluded that Hager had received the task training. Although I reach a different conclusion than the Respondent on the question of whether the training was provided, the record does not provide a basis for concluding that the Respondent's inquiry or conclusion on this score was tainted under the Act. At any rate, I view the task training issue as a red herring. The record does not provide any basis for believing that

such training of an experienced operator like Hager would have covered something so basic as the necessity of keeping the road in view while driving a 550,000-pound truck. Hager did not claim that his decision to duck down under the dashboard resulted from his not being adequately familiar with proper operation of the truck, or because he had not been trained to keep the road in view while driving. Indeed, Hager indicated that he took that action impulsively.

In addition, I do not view the MSHA finding regarding the inadequacy of the Respondent's policies and procedures as something that the Respondent would necessarily be expected to rely on to adjust Hager's discipline to something less than suspension and termination. As noted above, MSHA found that Hager's reaching for his hard hat and losing control of the vehicle was a cause of the accident and Hager himself told the Respondent, and reaffirmed at trial, that the accident was "100 percent Jerry Hager." When Evans and Milam asked Hager if there were things they should know about the circumstances of the accident that might mitigate his culpability, he never stated that his actions or the accident resulted from the inadequacy of the Respondent's policies and procedures with respect to securing items in the cab of the truck.

The same conclusion is appropriate with respect to the General Counsel's argument that the Respondent should have mitigated Hager's discipline based on the State Agency's finding that the berm along the road, at least in its post-accident condition, was not adequate. Under the circumstances here, the General Counsel's argument based on the berm violation is another red herring. There is nothing in the record to show that Hager's accident was the result of an inadequately constructed berm. The General Counsel did not elicit any testimony to that effect from Hager or anyone else. To the contrary, the only evidence on that particular point was the testimony of Evans, a 37-year veteran of the mining industry, who credibly stated that no berm he had ever seen would have kept Hager's truck from continuing off the road and rolling over and down the hill.

For the above reasons, I find that the Respondent has met its responsive burden and shown that it would have suspended and discharged Hager based on his "negligent/unsafe act resulting in bodily injury and property damage" even if Hager had not engaged in activities protected by Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act. The complaint allegations should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. United Mineworkers of America, International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

¹⁹ The General Counsel argues that the Respondent could not legitimately take into account that Hager's negligence was more extreme than that of Muenich or Dingess because the company's disciplinary policy, handbook and teamwork program manual make "no references to negligence-related sliding scales." Brief of General Counsel at Pages 27-28. This argument is not persuasive. It is common sense that an employer will tailor the severity of the discipline it imposes to the severity of the offense. The fact that an employer's written materials do not specifically

discuss levels of misconduct does not mean that it must treat all misconduct - from the most minor to the most egregious-the same. See, e.g., *Mountain Shadows Golf Resort*, 338 NLRB 581, 583-584 (2002) (Board finds no discrimination where employer had no specific rule or written policy but rather employed a "common sense" policy "in which the level of discipline depends on the severity of the conduct."), petition for review denied by 86 Fed. Appx. 305 (9th Cir. 2004).

3. The Respondent was not shown to have committed any of the violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.²⁰

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 4, 2018.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.